APPENDIX A

GENERAL ELECTRIC CREDIT CORP.,
Plaintiff,

v.

Ernest V. NOBLETT, Defendant.

Civ. No. 66-375
United States District Court
W. D. Oklahoma.

May 29, 1967.

Action by assignee of lessor of bowling pin setting machine to recover from lessee the accelerated balance due under the lease. On plaintiff's motion for summary judgment, the District Court, Eubanks, J., held that affidavit and answer of lessee alleging that there were writings to corroborate his claim that he was not individually liable under lease and that he was attempting to locate those writings presented fact issue precluding summary judgment. The Court further held that under lease providing that lessor might make an assignment but that assignee should not be held responsible for any of lessor's obligations, assignee was not barred from recovering accelerated balance by lessor's alleged breach of warranty, disregard of agreement to provide on the job training and failure to make allowance for advertising, even though lessor had become bankrupt.

Motion denied.

1. Evidence Key # 384

Parol evidence cannot be allowed to vary or contradict the terms of a written instrument.

2. Novation Key # 7

Lessee who signed lease as individual could not defend action to recover payments due thereunder on ground

that he and lessor had agreed that liability would be shifted to corporate entity upon its incorporation unless he was able to produce written evidence that only corporation was to be responsible under the lease and unless he was able to establish that lessor had notice of that condition.

3. Federal Civil Procedure Key # 2505, 2539

In action to recover payments due under lease of bowling pin setting machines, affidavit and answer of lessee alleging that there were writings to corroborate his claim that he was not individually liable under lease and that he was attempting to locate those writings presented fact issue, precluding summary judgment.

4. Set-Off and Counterclaim Key # 3

Uniform Commercial Code provision stating that an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by assignee who takes his assignment for value, in good faith and without notice of a claim or defense repealed, in effect, statute providing that assignee may maintain an action but subject to all defenses and rights of counterclaim, recoupment or setoff which would have been available if action had been brought in name of assignor. M.G.L.A. c. 106 § 9-206(1); c. 231 § 5.

5. Bailment Key # 21

Under lease providing that lessor might make an assignment but that assignee should not be held responsible for any of lessor's obligations, assignee was not barred from recovering accelerated balance due under lease by lessor's alleged breach of warranty, disregard of agreement to provide on the job training and failure to make allowance for advertising, even though lessor had become bankrupt.

Gary C. Rawlinson, of Fellers, Snider, Baggett & McLane, Oklahoma City, Okl., for plaintiff.

Val R. Miller, of Crowe, Boxley, Dunlevy, Thweatt, Swinford & Johnson, Oklahoma City, Okl., Paul D. Sullivan, of Leach & Sullivan, Duncan, Okl., for defendant.

MEMORANDUM OPINION

EUBANKS, District Judge.

Plaintiff commenced this diversity action on October 5, 1966, alleging generally in its complaint that defendant and Bowl-Mor Company, Inc., entered into a written contract on May 20, 1965 whereunder defendant leased from Bowl-Mor eight automatic ten pin setting machines. According to the terms of that rental lease contract defendant agreed to pay, in installments, certain specified sums of money for the use of the machines, the first installment becoming due on September 6, 1965. The rental lease agreement provided, among other things, that "The Lessor (Bowl-Mor) may assign all its right, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee (Noblett) shall, however, continue in full force and effect."

The complaint alleges further that Bowl-Mor assigned the rental lease agreement to plaintiff on May 24, 1965, and thereafter the defendnat made two installment payments as was required of him but defaulted on the installment due September 20, 1965, and has made no payments since. Recovery is sought for the accelerated balance due under the lease after deducting the proceeds of the sale of the machines. (By agreement of both parties such sale has been accomplished since this suit was filed.)

By way of answer the defendant admits the execution of the rental lease agreement and does not deny his default but raises two defenses. (1) That he is not individu-

ally obligated because it was agreed between him and Bowl-Mor that the contract be signed by him as an individual only to expedite delivery of the machines, but that it was understood that as soon as he formed a corporation, Marlow Lanes, Inc., all of lessee's responsibility under the contract would be shifted to that corporate entity. In this part of his defense defendant says plaintiff had notice of such understanding between him and Bowl-Mor and subsequently recognized Marlow Lanes, Inc., (the corporation which was indeed formed) as the obligor thereunder. (2) That the machines were not as warranted and represented to him in that they were defective and would not operate efficiently. Also defendant claims a breach of further provisions of the agreement to allow him an advertising and sign allowance and a failure on lessor's part to provide an agreed "on-the-job training" for employees. Defendant contends that this second defense amounts to a failure of consideration for the contract.

The case is now before the Court on motion of plaintiff for summary judgment to which is attached the affidavit of R. N. Lamy, plaintiff's credit specialist, saying, in effect, that plaintiff took the assignment of the rental lease from Bowl-Mor for a valuable consideration, in good faith and without notice of any claim or defense which Noblett may have against Bowl-Mor. Responding to plaintiff's motion defendant substantially reiterates his two defenses in an affidavit but adds thereto by saying that there are writings that will corroborate his claim that he was not to be held individually obligated, which writings he is currently attempting to locate.

[1] Both parties agree that Massachusetts substantive law governs this matter because of contract provisions. Able counsel for both parties are apparently also in accord that irrespective of whether it is a matter of procedural law and thus governed by the rules of the forum, parole *(sic)* evidence cannot be allowed to vary or contradict the terms of a written instrument. With reference to the spe-

cific issue of individual or corporate liability it was said in Norfolk County Trust Co. v. Green, 304 Mass. 406, 24 N.E.2d 12 (1939), "but the written agreement purports on its face to bind the defendant and appears to set out a complete contract of the parties. Parol evidence to contradict or vary its terms was not admissible." For other cases holding that where there is nothing in the instrument to indicate the signer thereof acted otherwise than as an individual, or that a corporation was to be bound, a signer will not be heard to say he acted in a representative capacity only, see Ricker v. B-W Corp., 349 F.2d 892 (10th Cir. 1965); Mid-America Corp. v. Miller, 372 P.2d 14 (Okl.1962; and 82 A.L.R.2d 424).

[2, 3] For the foregoing reason the first defense herein must fail unless defendant is able to produce written evidence that only Marlow Lanes, Inc., was to be responsible under the lease and be further able to establish that plaintiff had notice of same. Since this is a possibility according to the affidavit and answer of defendant it follows that, as regards this point, plaintiff's motion for summary judgment must be, and accordingly is overruled.

The question relative to the second defense of Noblett presents a much more difficult problem. As noted above the lease contained a proviso that "Assignee (General Electric Credit Corporation, plaintiff herein) shall not be held responsible for any of the Lessor's (Bowl-Mor) obligations."

Whether the allegations in the answer and amendment thereto, to-wit: breach of warranty of fitness of the machines; disregard of the agreement to provide "on-the-job training"; and failure to make allowance for advertising and sign, be technically designated as "defense," "counterclaim" or "set-off" and regardless of whether defendant seeks recission of the contract or affirmance with damages to him because of the alleged breach, it is clear that all of the omissions complained of by him were obligations of Bowl-Mor, not plaintiff. It seems further to be clear from

the contract that plaintiff is exonerated from responsibility for all of these complaints unless the contract provision allowing same be invalid.

Section 9-206(1) of the Massachusetts Uniform Commercial Code provides: "Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim or defense * * *."

[4] At the time the above statute was enacted the Supreme Court of Massachusetts had held in Quality Finance Co. v. Hurley, 337 Mass. 150, 148 N.E.2d 385, that "where a conditional sales agreement for an automobile provided that if the contract was purchased from seller the purchaser should have all the rights of the seller and the buyer waived as against the purchaser all defenses which the buyer might have against the seller, provision was invalid as contrary to the policy of the statute." Therein the court specifically found that such a "waiver of defenses" was in contravention of the express terms of Massachusetts G.L. (Ter.Ed.) C. 231, Sec. 5, as amended by St.1945, C. 141, Sec. 2, which (at the time) provided: "The assignee * * * may maintain an action thereon in his own name, but subject to all defenses and rights of counterclaim, recoupment or set-off which the defendant would have been entitled had the action been brought in the name of the assignor." The court in Hurley carefully examined the decisions from many jurisdictions and observed, "there is a conflict of authority whether such a waiver clause is valid." I do not have available the Statutes of Massachusetts so do not precisely know what happened to G.L. (Ter.Ed.) C. 231, Sec. 5, as amended by St. 1945, C. 141, Sec. 2, when, in 1958, that state enacted Sec. 9-206 of its Uniform Commercial Code but hold that the subsequent act in effect repealed the above excerpted por-

tion of the earlier one. Therefore if Hurley were again before the Supreme Judicial Court of Massachusetts a contrary result would obtain. Such opposite holding has since been reached by a trial court in New Jersey in a case involving a contract identical, in pertinent part, with the one in this case. See General Electric Credit Corporation v. Brick Plaza Lanes, Inc., Docket No. L 25891-64, A-13908, Superior Court of Ocean County, New Jersey.

Other cases holding to the same general effect are B-W Acceptance Co. v. Richmond, 46 Misc.2d 447, 259 N.Y.S.2d 965; Beam v. John Deere Co., 240 Ark. 107, 398 S.W.2d 218; and First National Bank of Elgin v. Husted, 57 Ill. App.2d 227, 205 N.E.2d 780. None of the cases cited by defendant involve an interpretation of similar contract provisions as related to the Uniform Commercial Code, Sec. 9-206. Although not involving the Uniform Commercial Code this very Court, through Judge Bohanon, upheld a contract provision whereby buyer agreed to settle all his claims against seller directly against seller and agreed not to set up any such claims against the assigns of seller. See Straight v. James Talcott, Inc., 10 Cir., 329 F.2d 1.

[5] Defendant still has his remedies as against Bowl-Mor although regrettably that concern is in bankruptcy. The unfortunate circumstances in which defendant finds himself in this case is no legal ground for violating his contract heretofore made. For the foregoing reasons I hold that the second defense plead herein is unavailable as against the plaintiff.

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
APR 2 1968
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9704—JANUARY TERM, 1968

ERNEST V. NOBLETT, Appellant,	:	
vs.	:	Appeal From the United States District Court For the Western District of Oklahoma
GENERAL ELECTRIC CREDIT CORPORATION, Appellee.	:	

Val R. Miller (Paul D. Sullivan, with him on the brief) for Appellant.

Gary C. Rawlinson and James D. Fellers for Appellee.

Before MURRAH, Chief Circuit Judge; LEWIS, Circuit Judge, and CHRISTENSEN, District Judge.

CHRISTENSEN, District Judge.

In this diversity action General Electric Credit Corporation obtained summary judgment against Ernest V. Noblett for rentals under a bowling equipment "Rental Lease," which had been assigned to the corporation by the lessor, Bowl-Mor Company.

Whether the case was factually ripe for summary judgment and whether Noblett in the rental agreement validly waived defenses as against the assignee as a matter of law, are the problems presented by this appeal.

Noblett's answer as amended had raised among other defenses that of failure of consideration by reason of alleged breaches of an express warranty against defects, an implied warranty of fitness and the obligations of the lessor to furnish advertising and training assistance.

The rental agreement included the following provision:

> "The lessor may assign all its right, title and interest under this lease, including the payments due hereunder, but the assignee shall not be held responsible for any of the lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

Applying Massachusetts law in accordance with the terms of the rental agreement, and being of the view that Noblett thereby had waived the pleaded defenses, General Electric Credit Corp. v. Noblett, 268 F. Supp. 984 (W.D. Okl. 1967), the trial court granted summary judgment for the balance of the rentals in the sum of $64,389.91, together with interest of $3,541.45, $11,814 attorney's fees and costs of the action.

Section 9-206, Chapter 106, of the General Laws of Massachusetts, based upon the Uniform Commercial Code, provides:

> "(1) Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good faith and without notice of a claim

or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the Article on Commercial Paper (Article 3) . . ."

The equipment did not constitute "consumer goods" within the meaning of the Act.

The appellant Noblett contends that under any view of the Massachusetts law this case was not ripe for summary judgment since there was an issue of fact whether the assignee credit corporation took the assignment "for value, in good faith, and without notice of a claim or defense"; if not, under the terms of the Code no waiver agreement would be recognized.

In support of its motion for summary judgment the credit corporation filed below an affidavit from one R. N. Lamy, who stated that he was a Credit Specialist for General Electric Credit Corporation; that on the 24th day of May, 1965, General Electric Credit Corporation took an assignment from Bowl-Mor Company, Inc., for "good and valuable consideration" of the lease in question and "that said assignment was taken by General Electric Credit Corporation in good faith and without notice of any claim or defenses which Ernest V. Noblett might have against Bowl-Mor Company, Inc".

We are not unmindful of the practical difficulties of establishing by affidavit in strict compliance with Rule 56(e), F.R.C.P., a lack of notice on the part of a corporation having numerous officers, managing agents and employees. A reasonable application is all that is required. It is apparent that in any view this affidavit did not conform with the requirements that such an affidavit be made on personal knowledge, state facts which would be admissible in evidence and show affirmatively that affiant was competent to testify to the matters therein stated. See Zampos v. United States Smelting and Refining and Min. Co., 206 F.2d 171 (10th Cir. 1953). Cf. Bumgarner v. Joe Brown

Company, 376 F.2d 749 (10th Cir. 1967); Preble v. Johnson, 275 F.2d 275 (10th Cir. 1960).

But at no time did the appellant indicate to the court below, directly or indirectly, that he questioned the sufficiency or effect of the affidavit. His affidavit in response to the motion was confined to assertions that Bowl-Mor had failed to perform its obligations and that there had been an understanding that a corporation to be organized by Noblett rather than he personally was to be liable for rentals. No denial or other reference was made to the Lamy affidavit on the question of notice. Noblett asked, and was granted, leave to make a further search and showing concerning his claim that there was some writing relieving him from personal responsibility. No such showing was made and no further affidavit was submitted. The appellant did not indicate to the trial court in any way that he questioned the form, substance or effect of the affidavit.

It was said long ago and observed in various applications since that "Errors as a rule to be reviewable on appeal must be definitely and timely called to the attention of the trial court in order to afford a fair opportunity for it to pass upon the matter to correct its own errors, if any." Scritchfield v. Kennedy, 103 F.2d 467 (10th Cir. 1939). An affidavit that does not measure up to the standards of 56(e) is subject to a motion to strike; and formal defects are waived in the absence of a motion or other objection. 6 Moore's Federal Practice § 56.22(1) p. 2817; 3 Barron and Holtzoff, Federal Practice and Procedure § 1237, p. 171; Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., 360 F.2d 446 (5th Cir. 1966); United States v. Western Electric Co., 337 F.2d 568 (9th Cir. 1964); Klingman v. National Indemnity Company, 317 F.2d 850 (7th Cir. 1963). Cf. Wagoner v. Mountain Savings and Loan Association, 311 F.2d 403 (10th Cir. 1962).

The reliance of the trial court under the circumstances upon the sufficiency of the affidavit is completely understandable. The belated claim of error in such respect could

be persuasive only to prevent a gross miscarriage of justice. Such is not the case here; there is a more dispositive reason why the summary judgment cannot stand.

The trial court determined that in agreeing that "the Assignee shall not be held responsible for any of the Lessor's obligations", and that "the obligations of the Lessee shall, however, continue in full force and effect", Noblett effectually indicated "that he will not assert against an assignee any claim or defense which he might have against the . . . Lessor" within the contemplation of § 9-206(1), and, hence, that he was barred from asserting against the appellee his defense of failure of consideration and related defenses.[1]

Our attention has been directed to two unpublished decisions of courts in other states holding that the precise language used in the form of the lease in question is valid and binding under Massachusetts law for the purpose.[2] And we are mindful that in Straight v. Talcott, Inc., 329 F.2d 1 (10th Cir. 1964), this court held that an agreement of a buyer that he would settle all claims against the seller directly with him and would not set up any such claim against his assignee, operated to waive defenses in a suit brought by the assignee.

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1 "Whether the allegations in the answer and amendment thereto, to-wit: breach of warranty of fitness of the machines; disregard of the agreement to provide 'on the job training'; and failure to make allowance for advertising and signs, be technically designated as 'defenses', 'counterclaim' or 'set-off' and regardless of whether defendant seeks rescission of the contract or affirmance with damages to him because of the alleged breach, it is clear that all of the omissions complained of by him were obligations of Bowl-Mor, not plaintiff. It seems further to be clear from the contract that plaintiff is exonerated from responsibility for all of these complaints unless the contract provision allowing same be invalid".

2 General Electric Credit Corporation v. Brick Plaza Lanes, Inc., et al., Superior Court of New Jersey Law Division, Ocean County, Docket Number L25891-64, A-13908 (1966), and Baldino v. ABC Appliance Service, 83 Pa. D. & C. 305 (Philadelphia County, 1952).

No Massachusetts decision has been called to our attention, nor can we find any, defining how far from the precise language of the authorizing statute an agreement might depart and still be effective as a waiver. Neither the decision of the trial court nor any of the cases cited come to grips expressly with the most persuasive phase of appellant's argument—that the intent manifested by the quoted provision of the lease agreement was not to waive defenses as allowed by § 9.206(1) of the Uniform Commercial Code but to relieve the assignee of the duty of affirmative performance of the lessor's obligations under the lease with reference to an entirely different section of the Code. It is provided in § 2.210:

> "(4) An assignment of 'the contract' or of 'all my rights under the contract' or any assignment in similar general terms is an assignment of rights and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties of the assignor and its acceptance by the assignee constitutes a promise by him to perform those duties. This promise is enforceable by either the assignor or the other party to the original contract."

The provisions of the lease agreement which speaks in terms of obligations is peculiarly suited to an indication for the purposes of § 2.210(4) that there was no "delegation of the performance of the duties of the assignor" or a "promise by him to perform those duties." Indeed, more apt language for this purpose could hardly be devised than was used in the lease agreement. But with respect to waiver of defenses, the language at best is indirect and unclear and at its worst misleading or entrapping. The question of the appropriateness of language, however, is not the worst of the problem, which goes deeper into the very substance of the legal concepts involved.

An assignment in general terms under the Uniform Commercial Code, and, hence, under the present Massa-

chusetts law, is an assignment of rights, and unless the language or the *circumstances* indicate the contrary, it is also a delegation of performance of the duties of the assignor and its acceptance by the assignee, constituting a promise by him to perform those duties. The promise is enforceable by either the assignor or the other party to the original contract. In general, whether there is a delegation of duties as well as rights in and of itself does not affect defenses available to the other original contracting party. If there is a delegation of obligations, failure of consideration remains a defense, and the same is true even though there is no delegation of obligation to the assignee in the absence of waiver; the assignee stands in the shoes of the assignor as far as the right to recover is concerned in either event. Moreover, if there is a delegation of obligation to the assignee, this in and of itself does not relieve the assignor from the obligation of performance. If the assignor is required to respond to the other contracting party after duties have been delegated by the assignor, the assignee may be rendered liable to the assignor, which is a reason why a non-delegation agreement may be important to the assignee in the absence of a waiver of defenses.[3]

The point of these general principles is that defenses are available against the assignee in the absence of waiver, not because of the delegation or non-delegation of duties but because the assignee in either event must claim under the original contract and is subject to the defenses allowed thereby. The fact that the lease recited that the lessee should continue to be bound to his contracted obligations despite any assignment does not suggest in context that he

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[3] See generally William D. Hawkland, *A Transactional Guide to the U.C.C.* (A.L.I.) (1964), § 1.25 p. 150 et seq.; 6 Am. Jur.2d *Assignments*, § 102, p. 282; 3 Williston on Contracts (Third Ed—Jaeger), Sec. 432 pp. 177, et seq. Cf. Nickell v. United States, 355 F.2d 73 (10th Cir. 1966); Denver United States Nat. Bank v. Asbell Bros. Constr., 294 F.2d 289 (10th Cir. 1961); Imperial Refining Co. v. Kanotex Refining Co., 29 F.2d 193 (8th Cir. Kans. 1928).

agreed to waive defenses any more than the agreement that responsibilities of the assignor were not to be deemed delegated had anything to do with the waiver of defenses. The intent and meaning of the lease in this respect is made all the more clear by Bowl-Mor's assignment to the credit corporation which simply provides on the point that "Assignee shall have no obligations of lessor under said lease."

Whether responsibilities of the assignor were or were not delegated pursuant to § 2-210(4), or as a matter of general law, the rule continued operative that failure of consideration could be raised as a defense either against the assignee or the assignor in the absence of a waiver as authorized by the other provision of the Code. There was no such waiver. To enlarge the agreement concerning the non-delegation of obligation into such a waiver would be not only unwarranted but unfair. When appellant consented to the non-delegation to the assignee of obligations of the assignor under the lease, whether viewed from the standpoint of one learned in the law and capable of appreciating these distinctions, or as one only generally aware of the meaning of language, he reasonably could have assumed that the purpose was what it purported to be and was not to preclude his defenses should he not receive the consideration for which he bargained. We are of the opinion that as a matter of law there was no waiver of defenses.[4]

We see nothing in Straight v. Alcott, Inc., 329 F.2d 1 (10th Cir. 1964), *supra*, that warrants a contrary conclusion. There Oklahoma law was involved; the language which was employed more specifically sustained the con-

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[4] Even if the contract had been ambiguous on this point, summary judgment would have been inappropriate, since the appellant would have had the right to be heard on the question of intent as a matter of fact, and to resort to intrinsic aids to establish that intent at the trial. The lease agreement bears the letterhead of the lessor and appears to be on its printed form, and the rule of interpretation that in such event ambiguities are to be resolved against the drafter could well apply.

clusion reached and was not apparently designed for another purpose; it was not expressly questioned that the provision was intended to waive defenses, and the primary issue was whether such an agreed waiver would be valid under Oklahoma law. Massachusetts law governs the result here. In view of considerations discussed above and the general policy expressed in Quality Finance Company v. Hurley, 337 Mass. 150, 148 N.E.2d 385 (1957) it is fairly to be predicted that in the interpretation of the subsequently adopted Uniform Commercial Code an agreement that an assignment would not constitute a delegation of duties would not be so broadly construed as to be accepted in that state as a waiver of defenses under § 9.206(1).

REVERSED and remanded for further proceedings not inconsistent with this opinion.

APPENDIX C

FILED
United States Court of Appeals
Tenth Circuit
JUN 20 1968
William L. Whittaker
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9704—JANUARY TERM, 1968

ERNEST V. NOBLETT,	:	
Appellant,	:	
vs.	:	On Petition for Rehearing
GENERAL ELECTRIC CREDIT CORPORATION,	:	
Appellee.	:	

PER CURIAM.

Appellee has filed a petition for rehearing, its only contention justifying further notice being that the court has held in effect that the "Sales" provisions of the Uniform Commercial Code govern "Secured Transactions." In other words, it is argued that "the application of Section 2-210(4) was erroneous" and would open all secured transactions to question by indicating that in the absence of specific negation the obligation of performance would be placed upon the security holder as a matter of course. It should have been enough to preclude such misunderstanding to quote,

as we did, Section 2-210(4) which states among other things that there is a delegation of performance "unless the language or the circumstances (as in an assignment for security) indicate the contrary" (emphasis added). We did not refer to Section 2-210(4) to indicate that the "Sales" provisions of the Code necessarily governed Secured Transactions in the absence of language so providing but rather to demonstrate that waiver of affirmative performance is not the same as waiver of defenses for nonperformance by a party to the original contract.

Far from justifying the appellee's claim that we misconceived the relationship of the Sales provisions to the Secured Transactions provisions of the Code, we simply pointed up in our opinion the basic misconception implicit in appellee's argument that language in the rental agreement which would have been appropriate for purposes of Section 2-210(4) relating to Sales could serve the entirely different purpose of satisfying the waiver of defense requirements established in Section 9-206(1) concerning Secured Transactions.

Finally, appellee sees in the language of the rental agreement that "the assignee shall not be responsible for any of lessor's obligations", an enigma if it is not held to constitute a waiver of defense by the lessee since in a secured transaction an assignment does not delegate performance in any event. Perhaps appellee is in the best position to explain this supposed enigma; in the assignment by which it took the security it was again stipulated that "assignee shall have no obligation of lessor under the lease". The same question applies—why, if there would be no such obligation anyway, was this specifically provided there? No matter the reason, such language does not operate as a waiver of defenses under Section 9-206(1) and this is the determinative point.

The petitions for rehearing and for rehearing en banc are denied.

APPENDIX D

STATUTES

2-106(1)

Sec. 2-106. (1) In this Article unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 2—401). A "present sale" means a sale which is accomplished by the making of the contract. * * *

9-105(b)

Sec. 9-105. (1) In this Article unless the context otherwise requires:

* * * * * *

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods [; a charter or other contract involving the use or hire of a vessel is not chattel paper]. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

9-102

Sec. 9-102. (1) Except as otherwise provided in Section 9-103 [¶703] on multiple state transactions and in Section 9-104 [¶704] on excluded transactions, this Article applies so far as concerns any personal property and fixtures within the jurisdiction of this state

(a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents,

instruments, general intangibles, chattel paper, accounts or contract rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This Article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This Article does not apply to statutory liens except as provided in Section 9-310 [¶745].

(3) The application of this Article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this Article does not apply. [Comp. at ¶ 101, 105, 500.]

3-104

Sec. 3-104. (1) Any writing to be a negotiable instrument within this Article must

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this Article; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of receipt of money with an engagement to repay it;

(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other Articles of this Chapter, and as the context may require the terms "draft", "check", "certificate of deposit" and "note" may refer to instruments which are not negotiable within this Article as well as to instruments which are so negotiable. [Comp. at ¶ 500.]

1-102(1)

Sec. 1-102. (1) This Chapter shall be liberally construed and applied to promote its underlying purposes and policies.

APPENDIX E

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION. OCEAN COUNTY

Docket No. L 25891-64
A-13908

GENERAL ELECTRIC CREDIT CORPORATION,	:	
Plaintiff	:	
	:	Civil Action
v.	:	Opinion on Motion
BRICK PLAZA LANES, INC., a New Jersey corporation, et als,	:	
Defendants	:	

Decided: May 9, 1966

Appearances: Mr. Herman A. Adler,

for the Plaintiff

Mr. Gary O. Turndorf,

for the Defendants.

LARRABEE, J. C. C. (Temporarily Assigned) Plaintiff General Electric Credit Corporation sues Brick Plaza Lanes, Inc. and six other individual defendants: the Rubens, the Vogels and the Pallays contending that the Lanes rented bowling pin setting machines from Bowl-Mor, that the individual defendants guaranteed performance by the Lanes, that the lease was assigned to General; that the Lanes defaulted and that some $209,993.71 balance is due for the balance of rental.

Defendants deny the balance claimed and set up various defenses, i.e. violation of implied and express warran-

ties; voiding of the lease by repossession; claim of credit for cost of repairs and security deposit; claim of other credits given to the Lanes by Bowl-Mor when the Lanes had no notice of the assignment; fraud and misrepresentation by Bowl-Mor; that the assignment was without consideration; that General is the alter-ego of Bowl-Mor and that defenses against the latter are available against the former; that payments claimed constitute a penalty; that defendants have not received credit for fair market value; that the acts of General discharged the defendants from liability.

Defendants counterclaimed alleging misrepresentation by Bowl-Mor and now seek to file a Third Party Complaint alleging that Otis Elevator manufacturer and Bowl-Mor lessor warranted that the machines would be suitable for their intended use, but were negligently made.

Bowl-Mor represented that the machines had design features that would provide long life, trouble free, but they were defective.

The defendant seeks recovery and recission.

The Motion is opposed by General.

The lease was executed August 24, 1962. It provided that:

> "This lease shall be interpreted in accordance with the laws of the Commonwealth of Massachusetts."

The Statute law of Massachusetts then provided:

> "The Assignee of a non-negotiable legal chose in action which has been assigned in writing may maintain an action thereon in his own name, but subject to all defenses and rights of counterclaim, recoupment or set off to which the defendant would have been entitled had the action been brought in the name of the Assignor."
>
> G. L. of Mass. (Ter. Ed.) C. 231 Sec. 5
> as amended in 1945.

Subsequent to the enactment of the Statute the Massachusetts Court held that the lessor who assigned his lease to an assignee could not bar the lessee from asserting against the assignee those defenses which he could have asserted against the assignor-lessor. *Quality Finance* v. *Hurley* 337 *Mass.* 150, 148 *N.E.2nd,* 385 (1958)

This decision and the Statute are considered because the lease contained an agreement that:

> "The Lessor may assign all its right, title and interest under this lease, including the payments due hereunder, but the Assignee shall not be held responsible for any of the Lessor's obligations. The obligations of the Lessee shall, however, continue in full force and effect."

Thus, it is contended by General that the clause rules out the basis for a Third Party Action, because it makes unavailable to Brick Plaza as defenses to the original complaint; the issues set up in the Third Party Complaint.

The Lanes contend that under the Massachusetts Statute and the Hurley case the issues set up in the Third Party complaint can be raised as defenses in the main suit, thus there is an identity of issues and the Third Party Action should be permitted.

In or about 1958 Massachusetts adopted the Uniform Commercial Code. *Sec.* 9-206 provided:

> "1. Subject to any Statute or decision which establishes a different rule for buyers of consumer goods, an agreement by a buyer that he will not assert against an Assignee any claim or defense which he may have against the Seller is enforceable by an Assignee, etc."

In October, 1963, the Massachusetts legislature amended the section as follows:

> "1. Subject to any statute or decision which establishes a different rule for buyers or lessees of con-

sumers goods, an agreement by a buyer or lessee that he will not assert, etc."

Thus the Massachusetts statute now permits the assignee to have the benefit of the clause except in the case of buyers or lessors of consumers' goods. The defendant in the Hurley case had purchased an automobile.

The 1945 statute is, subject to the exception, contrary to Sec. 9-206 which in effect, repeals the 1945 statute as to sales and leases but not the exception.

Read realistically it must mean that the exception applies only to consumers' goods and that the 1945 statute survives with regard to sales and leases only so far as it applies to consumers' goods.

In construing the contract, should the Court apply the law of Massachusetts as of 1962, as represented by the Hurley case, or the law as it is today? Certainly the parties to such a lease comprehend and are aware that the law changes from time to time. Thus the Massachusetts law as of today should apply.

This conclusion raises the question as to whether the Hurley case, which was in the area of consumers' goods, constitutes a precedent which would be followed today. It was a case of consumers' goods, in which the seller's contract contained a clause, similar to the one in the instant case, denying to a purchaser the right to raise against the assignee the defenses he had against the seller.

The Court held the waiver clause ineffective because of the 1945 statute, first; and secondly, because of the very strong public policy of protecting conditional vendees against "the imposition by conditional vendors and installment houses . . ." and third, because the waiver clause is an attempt to give a non negotiable agreement the attributes of negotiability."

Today a different result would be reached by the Massachusetts Court because the facts of the case fit into

the provisions of the *U.C.C. Sec.* 9-206 expressly provides that the waiver clause is effective in both sales and lessees except where consumers' goods are the subject matter. *Sec.* 9-206 also excepts instances where real defenses are available (see 12*A* 13-305). None of the defenses asserted fall within the scope of 305.

If the Hurley case was before the Massachusetts Court today, and if the subject matter was commercial apparatus, not consumers' goods, the decision would not be the same. *Sec.* 9-206 of the *U.C.C.* would impliedly repeal the 1945 statute because it is inconsistent with it when commercial appartus is the subject matter.

Sec. 9-206 of the *U.C.C.* points up the fact that the "public policy" referred to in Hurley is related to the field of consumers' goods.

Sec. 9-206 expressly deals with the objection that the waiver clause is an attempt to give to non negotiable paper the attributes of negotiability.

It expressly permits real defenses as distinguished from personal defenses, thereby recognizing the status of the contract or lease as comparable to that of a negotiable instrument.

Defendant further contends that the defense of fraud entitles the defendant to recission which would render the contract a nullity and that consequently plaintiff's rights would be subject to defendant's equity of recission.

However, the type of fraud alleged does not come within the scope of Section 3-305(c).

The Motion for permission to file a Third Party complaint is denied.

APPENDIX F

DISTRICT AND COUNTY REPORTS

BALDINO ET UX. v. ABC APPLIANCE SERVICE, ETC., ET AL.

Bailments—Sale of personal property under bailment lease—Provisions for assignment of lease—Waiver by assignee of defenses against lessor—Validity—Dispute as to defect in subject of lease—Refusal of lessor to pay—Bad credit report by assignee—Rights of lessee.

1. A clause in a bailment lease providing that the lessor may assign the lease, in which case lessor's assignee shall have all rights, powers and remedies of lessor but shall be subject to none of lessor's obligation, is valid and not against public policy.

2. Where such a lease is assigned to a bank, the lessee cannot justify refusal to make payments on the ground that the article leased was defective, nor is he entitled to have the lease canceled on that ground to prevent the bank from giving unfavorable credit references because of his failure to satisfy his obligation under the lease, or to recover for injuries allegedly sustained because of such references.

3. Under the circumstances above outlined, the lessee has no equitable cause of action against the lessor though he may have an action at law for damages for breach of contract.

Preliminary objections to complaint of C. P. No. 6 of Philadelphia County, September term, 1952, no. 314.

Bucci & Bucci, for plaintiffs.

Sundheim, Folz, Kamsler & Goodis and *Ernest L. Nagy*, for defendants.

FLOOD, J., December 24, 1952.—This case is before the court on preliminary objections to plaintiffs' complaint in

equity. The complaint alleges that plaintiffs purchased a Zenith television set from defendant ABC Appliance Service, hereinafter called ABC; that payment for this set was arranged under a bailment lease providing among other things that the lessor might assign the lease, in which case lessor's assignee should have all the rights, powers and remedies of lessor under the lease but should be subject to none of lessor's obligations; that the lease was thereupon assigned to defendant bank; that plaintiffs received and accepted delivery of the set from ABC but that the set was defective from the outset and never performed satisfactorily while in plaintiffs' possession. The complaint further avers that ABC made several futile attempts to remedy the aforesaid defects and eventually refused to attend to plaintiffs' complaints; that as a result of this plaintiffs refused to make further payments to the bank unless the set was either replaced or repaired; that the bank repossessed the set and subsequently sold it for the highest price obtainable, leaving a balance of $163.24 due from plaintiffs to defendant bank. Plaintiffs allege further that at a later date, they applied for an extension of credit at the Pennsylvania Company and this application was rejected due to unfavorable reference given by defendant bank; that upon inquiry plaintiffs were advised by defendant bank to pay the purported $163.24 balance due this bank. Whereupon plaintiffs pray: (a) That the lease agreement be canceled; (b) that defendant bank be restrained from giving unfavorable credit reference as to plaintiffs; (c) that defendants be ordered to compensate plaintiffs for injuries they sustained because of defendants' acts, and (d) for such general relief as the court may deem proper and fair under the circumstances.

Each defendant filed preliminary objections averring that plaintiffs have failed to state a valid cause of action as to it.

The determination of the question involved as to defendant bank depends upon the assignment clause in the lease. The clause itself is clear. It is in effect a waiver as

to assignee of any defenses plaintiffs have against the assignor. Unless the clause is unconscionable or against public policy we are bound to enforce it.

It is well settled that an assignee holds the assigned instrument subject to all the equities with which it was affected in the hands of the assignor. But it is equally well settled in Pennsylvania that the debtor may be estopped from asserting these equities as against the assignee by the declaration that he has no defense or set-off to the debt assigned. In the face of such declaration he cannot set up his defense against an assignee who takes on the faith of it: Ashton's Appeal, 73 Pa. 153 (1873); Sprenger for use, v. Litten, 142 Pa. Superior Ct. 194 (1940).

The basis for these decisions is not the phrasing of the declaration but the fact that such declarations induce the assignee to take the assignment. It would be inequitable to allow the debtor to later assert a defense which he declared that he did not have or he would not set up.

It has been held that if a maker states on a non-negotiable promissory note that he agrees that the note shall be subject to the same rules governing commercial paper as to equities, he waives his right to inquire into the fairness of the original transaction or the adequacy of the consideration: Howie v. Lewis, 14 Pa. Superior Ct. 232 (1900).

We can see no substantial difference between the agreement before us and an agreement that the instrument should be treated as commercial paper as to equities. In both situations the obligor is agreeing not to assert any defenses he may have against the assignor as to the assignee. Therefore the fact that the television set was defective is irrelevant in determining the rights and liabilities of plaintiffs and defendant bank.

Under the facts before us, plaintiffs are in debt to defendant bank. Consequently the bank had a right to give the "bad references" complained of. The bank's objections must be sustained.

Defendant ABC contends that plaintiff's complaint fails to state a cause of action as to it. Under the alleged facts ABC's objection must be sustained. The complaint fails to assert any valid cause of action in equity against this defendant. Upon the facts stated in the complaint, plaintiffs may have a cause of action against ABC for damages for breach of contract but if so they have not fully spelled it out.

The preliminary objections are sustained. The complaint is dismissed as to both defendants.

APPENDIX G

307. (Monroe Co.)—General Electric Credit Corporation, Appellant v. Ludwig Beyerlein and Barbara Beyerlein, Respondents. — Order unanimously affirmed with costs. Memorandum: Since the personal property in question is not consumer goods, the reliance of the court below on Quality Finance Co. v. Hurley, 337 Mass. 150 as creating an exception to Section 9-206 of the Massachusetts Uniform Commercial Code was mistaken. In this case, however, where the lessor assigned the lease soon after its execution before delivery or installation of the goods and before beginning to perform its other obligations under the lease, a question to be resolved at trial exists whether the contract provision in the lease of personal property which purports to exempt the lessor's assignee "for any of lessor's obligations" relates to the exemption from lessee's defenses under Section 9-206 or whether it relates to other duties to be performed by the lessor under the contract. Noblett v. General Electric Credit Corporation — F.2d — (United States Court of Appeals for the Tenth Circuit decided April 2, 1968). There are also questions of fact which should be determined on a trial as to whether appellant took the assignment in good faith and without notice of defenses. (Appeal from Order of Monroe Special Term, Macken, J., denying motion for summary judgment.) Present: Bastow, P. J., Goldman, DelVecchio, Witmer, Henry, J. J.